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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JEFFREY ROSENFELD,

Petitioner,

v.

RIVER PLACE EAST HOUSING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

A debtor acquired real property in Virginia, and, as part of the acquisition, entered into an agreement to pay monthly cooperative assessments (which are similar in nature to homeowner's association dues). Thereafter, the debtor filed for Chapter 7 bankruptcy relief and received a discharge for all of his debts. The Cooperative Association seeks to collect assessments assessed after the date of discharge from the debtor personally instead of enforcing its *in rem* remedies.

Is a debtor's personal liability for post-petition cooperative assessments an unmatured contingent "claim" as defined by 11 U.S.C. §101(12), and therefore discharged pursuant to 11 U.S.C. §524?

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1. *In re Jeffrey Rosenfeld,* No. 90-12716-AT, slip op. (Bankr. E.D.Va. September 25, 1992).
2. *Board of Directors of River Place East Housing Corporation v. Jeffrey Rosenfeld,* No. 93-58-A, slip op. (E.D.Va. April 26, 1993).

3. *River Place East Housing Corporation v. Jeffrey Rosenfeld*, ___ F.3d. ___ , 1994 U.S. App. Lexis 9722 (4th Cir. May 4, 1994).

JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment on May 4, 1994. A Petition for Rehearing with Suggestion for Rehearing En Banc was denied on June 2, 1994. Jurisdiction is conferred on this Court by 28 U.S.C.S. §1254(1) (Law. Co-op 1988).

STATUTES INVOLVED

This case involves the following statutory provisions:

11 U.S.C. §101(5) (Collier 1992)

11 U.S.C. §101(12) (Collier 1992)

11 U.S.C. §523 (Collier 1990)

11 U.S.C. §524(a)(1) (Collier 1986)

11 U.S.C. §524(a)(2) (Collier 1986)

11 U.S.C. §727(b) (Collier 1978)

Va. Code Ann. §55-472 (Michie 1990)

The text of these provisions and related sections are reproduced in the Appendices G-K, at 54a-90a.

STATEMENT OF THE CASE

INTRODUCTION

In 1983, the Petitioner, Jeffrey Rosenfeld (hereinafter "Rosenfeld"), purchased an interest in a cooperative unit ("Unit") in River Place East Housing Corporation as an investment. (3a). Rosenfeld purchased the Unit by, in

part, executing and accepting the assignment of the Proprietary Lease Agreement ("Proprietary Lease"), and thereby became obligated to personally pay cooperative assessments which were to be assessed against the Unit. The obligation to pay assessments arose under both the Proprietary Lease and pursuant to the Declaration of Covenants, Easements, and Liens ("Declaration") recorded in the land records of Arlington County, Virginia (to which Rosenfeld agreed to be bound by accepting the assignment). (3a-4a).

Rosenfeld filed a Chapter 7 bankruptcy case in November of 1990, and obtained a Chapter 7 discharge on February 2, 1991. Subsequent to Rosenfeld's Chapter 7 discharge, River Place East Unit Housing Corporation ("River Place") filed suit in a Virginia state court to collect post-petition cooperative assessments. (4a). Rosenfeld filed a Motion for Contempt in the Bankruptcy Court for the Eastern District of Virginia, Alexandria Division, to enjoin these collection efforts.

The state court stayed the proceedings pending review by the Bankruptcy Court. The Bankruptcy Court granted Rosenfeld's Motion for Contempt and held that the post-petition assessments were discharged. (1a-12a). The United States District Court for the Eastern District of Virginia reversed the ruling, and the Fourth Circuit Court of Appeals affirmed the District Court. (13a-14a, 40a-51a). The Bankruptcy Court was conferred with jurisdiction pursuant to 28 U.S.C.S. §1334 (Law. Co-op. 1984 & Supp. 1990) and 28 U.S.C.S. §157 (Law. Co-op. 1986).

BACKGROUND

Rosenfeld purchased the rights to a unit in a cooperative apartment complex from Monument Associates as an investment on January 12, 1983. Rosenfeld acquired these rights to the Unit by executing and accepting an Assignment of Lease ("Assignment"), at which time he became obligated to pay assessments to River Place.[1] The obligation to pay cooperative assessments is specified in the Proprietary Lease and in the Declaration. Rosenfeld's obligation to pay the cooperative assessments arose at the time he executed and accepted the Assignment and assumed the obligations of the Proprietary Lease and Declaration.[2] (4a). The Proprietary Lease, as well as the Declaration, obligates owners of cooperative interests to pay monthly assessments for units in River Place.

Rosenfeld obtained financing for the purchase of the Unit from Trustbank Savings, F.S.B. ("Trustbank"). Rosenfeld provided Trustbank with a first Deed of Trust on the Unit. (4a).

Rosenfeld's financial situation began deteriorating in 1989, and he defaulted on, among other debts, the payment of his assessment obligations. River Place suspended Rosenfeld's right to use the common areas. The Unit became vacant prior to October of 1990 and remains empty to date. Rosenfeld subsequently filed

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[1] Rosenfeld's interest in the Unit consisted of an ownership interest in the cooperative association coupled with a possessory interest in Unit 902.

[2] The Proprietary Lease is the agreement between River Place and Rosenfeld that grants Rosenfeld a possessory interest in the Unit and requires him to pay cooperative assessments. The Declaration is the instrument which created the cooperative real estate project, known as River Place, in which the Unit is located.

for Chapter 7 bankruptcy relief on October 22, 1990. (4a).

During the pendency of Rosenfeld's bankruptcy case, Trustbank filed for relief from the automatic stay in order to foreclose on the Unit. Rosenfeld signed a consent order granting Trustbank relief from the stay. (4a). The Bankruptcy Court granted Rosenfeld a discharge under 11 U.S.C. §727 (Collier 1978) on February 13, 1991. To date, neither Trustbank nor its successors have foreclosed upon the Unit. (4a).

River Place continued to assess monthly cooperative assessments against Rosenfeld, and River Place filed suit in the Circuit Court of Arlington County, Virginia ("State Court") to collect all assessments made after the date Rosenfeld filed for bankruptcy. (4a-5a). While River Place had, and continues to have, *in rem* rights available to it, River Place chose to proceed against Rosenfeld personally.[3]

Rosenfeld filed responsive pleadings in State Court, and then filed a Motion for Contempt in the Bankruptcy Court for the Eastern District of Virginia in June of 1992, alleging River Place violated the permanent injunction against collection of a discharged debt granted by 11 U.S.C. §524(a) (Collier 1986). (3a, 78a). The State Court stayed the proceedings pending a decision by the Bankruptcy Court.

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[3] River Place has numerous *in rem* remedies available to it under the Proprietary Lease and Va. Code Ann. §55-472 (Michie 1990), including eviction in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, foreclosure, and the ability to seize and rent the Unit. (86a-90a).

The Bankruptcy Court granted the Motion for Contempt and enjoined River Place from pursuing any additional collection activities. (1a-2a). The Bankruptcy Court concluded that Rosenfeld's personal liability for post-petition assessments was discharged because the assessments constituted an unmatured and *contingent* obligation that was included within the broad definition of the terms "debt" and "claim" contained in 11 U.S.C. §101(12) (Collier 1992) and 11 U.S.C. §101(5) (Collier 1992), respectively. (8a-9a, 55a-57a). The Bankruptcy Court reasoned that River Place's right to payment for future assessments arose when Rosenfeld contracted to purchase his cooperative interest, and the payment of dues was contingent upon Rosenfeld's continued ownership of that interest. (8a-9a). In making its ruling, the Bankruptcy Court specifically rejected the line of cases holding that post-petition assessments were not discharged because they arose from covenants that run with the land. (6a-7a). The Bankruptcy Court also found River Place had broad *in rem* remedies to collect assessments assessed against the Unit.[4] (10a-11a).

River Place appealed to the District Court, which reversed the Bankruptcy Court's decision. (13a-14a). The District Court held that the obligation to pay assessments arose post-petition. (37a). As a result, according to the District Court, the assessments were not discharged. (37a). Rosenfeld appealed the District Court's decision.

The Fourth Circuit Court of Appeals upheld the decision of the District Court in an Opinion dated May 4,

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[4]The Bankruptcy Court also found that the evidence clearly established that the debtor wanted to be rid of this albatross but could find no one willing to foreclose or willing to take title. (6a).

1994. (40a-51a). A Petition for Rehearing and Suggestion for Rehearing In Banc filed by Rosenfeld was denied on June 2, 1994. (52a-53a).

REASONS FOR GRANTING THE WRIT

The decision of the Fourth Circuit Court of Appeals conflicts with:

a) a decision by the Seventh Circuit Court of Appeals;

b) decisions of this Court; and

c) decisions by the Supreme Court of Virginia.

Furthermore, the issue of the dischargeability of post-petition cooperative (and condominium) assessments affects the ability of most debtors to obtain the "fresh start" intended by Congress. Under the current law, dischargeability of the assessments is determined by the jurisdiction in which the debtor declares bankruptcy. If the debtor declares bankruptcy in the Seventh Circuit, the debt is discharged. However, in jurisdictions such as the Fourth Circuit, the debt is not discharged. A decision by this Court is needed to settle the conflict between the circuits and enable debtors to obtain a "fresh start."

I.
THE DECISION BY THE FOURTH CIRCUIT CONFLICTS WITH DECISIONS OF THE SEVENTH CIRCUIT AND THIS COURT REGARDING THE DISCHARGEABILITY OF HOMEOWNER'S ASSOCIATION ASSESSMENTS.

The Fourth Circuit Court of Appeals ("Fourth Circuit") in this case held that an association's claim for post-petition assessments does not arise until the assessments are assessed. (49a). According to the Fourth Circuit, the obligation to pay assessments is a covenant that

runs with the land and is thereby a function of owning the land with which the covenant to pay assessments runs. (46a). The Fourth Circuit reasoned that the obligation to pay the assessments arose out of Rosenfeld's post-petition ownership of the Unit, and not from Rosenfeld's pre-petition contractual obligations. (46a).

A. A Direct Conflict Exists Within The Circuits As To Whether Homeowner's Association Assessments Are Discharged.

The Seventh Circuit and many bankruptcy courts addressing the identical issue presented in this case have arrived at a contrary result, holding that post-petition assessments are discharged. The Seventh Circuit, in *In re Rosteck,* 899 F.2d 694, 697 (7th Cir. 1990), held that post-petition condominium assessments are discharged because the right to payment arises from a pre-petition contract.

The Court in *In re Rosteck, id.* at 696, utilized the same analytical framework used by the Bankruptcy Court in this case. The Seventh Circuit found that a "discharge" (granted under 11 U.S.C. §727) applies to all "claims." (82a-85a). The term "claim" is defined by 11 U.S.C. §101(12) as a "right of payment" whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, *contingent,* matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." (Emphasis added). (55a-56a). Association assessments that are assessed post-petition are a "claim" because: (a) the right to payment existed or arose at the time the debtor acquired the unit and agreed to become obligated under the underlying ownership documents; and (b) the obligation is unmatured, and is contingent upon, among other things, continued ownership.

Bankruptcy courts sitting in other circuits are also split on this issue, with approximately half the courts holding that post-petition assessments are discharged, and the remainder of the courts holding that the assessments are not discharged.[5]

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[5]The following courts have held that post-petition assessments are discharged:

Lower Courts in the Third Circuit: *In re Miller*, 125 B.R. 441, 443 (Bankr. W.D. Pa. 1991);

Lower Courts in the Fourth Circuit: *In re Hodge*, Case No. 90-10275-AT, slip op. (Bankr. E.D. Va. July 20, 1992);

Lower Courts in the Seventh Circuit: *In re Elias*, 98 B.R. 332, 337 (Bankr. N.D. Ill. 1989); *In re Montoya*, 95 B.R. 511, 514 (Bankr. S.D. Ohio 1988); *In re Behrens*, 87 B.R. 971, 975 (Bankr. N.D. Ill. 1988);

Lower Courts in the Eighth Circuit: *In re Affeldt*, 164 B.R. 628 (Bankr. D. Minn. 1994);

Lower Courts in the Ninth Circuit: *In re Cohen*, 122 B.R. 755, 758 (Bankr. S.D. Cal. 1991);

Lower Courts in the Tenth Circuit: *In re Turner*, 101 B.R. 751, 754-55 (Bankr. D. Utah 1989); and

Lower Courts in the Eleventh Circuit: *Matter of Wasp*, 137 B.R. 71, 73 (Bankr. M.D. Fla. 1992).

The following courts have held that post-petition dues are not discharged:

Lower Courts in the Second Circuit: *In re Raymond*, 129 B.R. 354, 365 (Bankr. S.D. N.Y. 1991);

Lower Courts in the Third Circuit: *In re McNeil*, 128 B.R. 603 (Bankr. E.D.Pa. 1991)

Lower Courts in the Fifth Circuit: *In re Hill*, 100 B.R. 907, 909 (Bankr. N.D. Ohio 1989);

Lower Courts in the Seventh Circuit: *In re Harvey*, 88 B.R. 860, 862 (Bankr. N.D. Ill. 1988);

Lower Courts in the Tenth Circuit: *In re Rink*, 87 B.R. 653, 654 (Bankr. D. Colo. 1987); *In re Horton*, 87 B.R. 650, 652 (Bankr. D. Colo. 1987); and

Lower Courts in the Eleventh Circuit: *In re: O'Mara*, 141 B.R. 227 (Bankr. M.D. Fla. 1992).

Guidance from this Court is needed to settle the dispute once and for all.

B. The Decision By The Fourth Circuit That Homeowner's Association Assessments Are Not Discharged Conflicts With Rulings By This Court.

The Fourth Circuit, in determining that Rosenfeld's obligation to pay post-petition cooperative assessments was not discharged, incorrectly: (a) applied state law and examined the nature of the obligation, rather than using federal law to determine whether or not the obligation to pay assessments consists of a dischargeable debt, and (b) failed to apply the broad definition of the terms "claim" and "debt" mandated by Congress and reaffirmed repeatedly by this Court. The Fourth Circuit's application of state law, and its narrow construction of the terms "claim" and "debt," are in conflict with the decisions of this Court in *Vanston Bondholders Protective Com. v. Green,* 329 U.S. 156, 162 (1946); *Johnson v. Home State Bank,* 11 S.Ct. 2150, 2154 (1991); and *Pennsylvania Dept. of Public Welfare v. Davenport,* 110 S.Ct. 2126, 2131 (1990). Had the Fourth Circuit applied federal law, and had it utilized the broad definitions of the words "claim" and "debt", the Fourth Circuit would have found that the post-petition cooperative assessments have been discharged.

This Court has clearly ruled that federal bankruptcy law, and not state law, determines what claims are discharged in bankruptcy. *Vanston Bondholders Protective Com. v. Green,* 329 U.S. at 162. The federal law applicable in this case is both: (a) the Bankruptcy Code definition of what is a "claim" and "debt"; and (b) the interpretive framework by which the terms "claim" and "debt" are to be construed.

As noted previously in Section I (A) of this Petition, the Bankruptcy Code defines both the term "debt" and the term "claim." 11 U.S.C. §101(12); 11 U.S.C. §101(5). In interpreting what these terms mean, this Court has repeatedly reaffirmed Congress' intent to have the "broadest possible" definitions in determining whether or not a particular obligation is a "claim" that should be viewed as discharged. *Johnson v. Home State Bank,* 111 S.Ct. at 2154; *Pennsylvania Dept. of Public Welfare v. Davenport,* 110 S.Ct. at 2131.[6]

Applying the broad definition of the word "claim" to cooperative assessments means that courts should decide whether the "right to payment" came into existence prior to the debtor filing for bankruptcy. In the case of cooperative assessments, the "right to payment" first arises when the debtor first becomes obligated to pay all future assessments. For example, in the instant case, the obligation arose when Rosenfeld purchased the Unit and assumed the obligations imposed upon him by the Proprietary Lease and the Declaration. After the debtor first assumes the obligation, all subsequent assessments, including the post-petition assessments, constitute "unmatured" assessments that are "contingent" both upon the continued ownership of the property by the debtor and upon the act of assessment by the association.

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[6]The legislative history in respect to the definition of "claim" states that:

> "By this broadest possible definition, . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court."

S. Rep. No. 989, 95th Cong., 2nd Sess. 21-22 (1978).

As such, all assessments made after the filing of the debtor's petition fall within the definition of a "claim" and are discharged.

The Fourth Circuit did not follow the above analytical framework mandated by this Court, and incorrectly concluded that the post-petition cooperative assessments were not discharged. The Fourth Circuit improperly applied state law to determine that the basis for the debt was a covenant that runs with the land, and construing the concept of a "claim" narrowly, incorrectly concluded that a "claim" arising from a covenant that runs with the land somehow arises anew each time the assessments are assessed. The Fourth Circuit should have determined that the "claim" arose on the date Rosenfeld agreed to become subject to River Place's right to make such assessments. Therefore, the Fourth Circuit's decision contradicts the mandates of this Court as stated in *Vanston Bondholder's Protective Com. v. Green, Johnson v. Home State Bank,* and *Pennsylvania Dept. of Public Welfare v. Davenport.*

II.

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE SUPREME COURT OF VIRGINIA REGARDING THE DISCHARGE OF PERSONAL LIABILITY FOR HOMEOWNER'S ASSOCIATION ASSESSMENTS.

This Court, in *Johnson v. Home State Bank, supra,* at 2154, and the Supreme Court of Virginia in *Gregory v. Peoples,* 80 Va. 355, 357 (1885), have held that a bankruptcy discharge severs the *in personam* liability of the debtor from the *in rem* liability imposed upon the land. (93a-94a). In the instant case, the Fourth Circuit, without explanation, failed to sever the personal liability

from the *in rem* liability in violation of established principles of federal bankruptcy law.

The Supreme Court of Virginia has explained that covenants that run with the land create two different bases of liability for the covenantor. *Old Dominion Iron and Steel Corp. v. VEPCO,* 215 Va. 658, 667, 212 S.E.2d 715, 722 n.5 (1975). First, the covenantor has a direct contractual relationship with the covenantee, which imposes personal liability upon the covenantor. Second, the covenantor is in privity of estate with the covenantee, and courts treat this as a contractual burden that attaches to the land and affects subsequent assignees. *Id.* 215 Va. at 667, 212 S.E.2d at 722, n.5.

Gregory v. Peoples, supra, at 357, involved the dischargeability of personal liability from a covenant running with the land. In *Gregory,* a seller/debtor conveyed property by general warranty deed to a purchaser at a time when the seller/debtor did not have full title to the property. The purchaser sued for damages, and the seller/debtor obtained title subsequent to bankruptcy. The Supreme Court of Virginia held that the covenant of title ran with the land, but that the covenant was not related to the issue of personal (*in personam*) liability of the seller/debtor, which was discharged. *Id.* at 357. (93a-94a).

Another case on point, *Johnson v. Home State Bank, supra,* deals with the dischargeability of a mortgage lien in a Chapter 13 case. In *Johnson v. Home State Bank,* this Court determined that a mortgage creates two liabilities: *in personam* liability of the debtor and *in rem* liability against the land. *Johnson v. Home State Bank,* 111 S.Ct. at 2154. Citing 11 U.S.C. §524(a)(1), this Court reaffirmed that a discharge under 11 U.S.C. §727 extinguishes the *in personam* liability of the debtor, but

does not discharge the creditors' *in rem* rights.[7] *Id.* at 2154.

The Fourth Circuit's decision is in conflict with the above decisions in *Johnson v. Home State Bank* and *Gregory v. Peoples* for the reason that it holds that personal liability is not discharged simply because the obligation arises from a covenant that runs with the land. Covenants that run with the land are not "unique" in bankruptcy law, and are not included in the debts that are exempted from discharge.[8] Personal liability arising from a covenant that runs with the land can be severed from the *in rem* liability, and the personal liability can be discharged. The common law exception to discharge that the Fourth Circuit has created in respect to covenants that run with the land should be overturned.

III.

THIS CASE INVOLVES THE RIGHT OF ALL OWNERS OF REAL PROPERTY TO HAVE THEIR PERSONAL LIABILITY FOR POST-PETITION HOMEOWNER'S ASSOCIATION DUES DISCHARGED, AND THEREBY FULLY ENJOY THE "FRESH START" CONTEMPLATED BY THE BANKRUPTCY CODE.

The issue which Rosenfeld brings before this Court involves interpretation of the statutory language of the Bankruptcy Code and Congress' intent in drafting the

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[7] Although creditors are enjoined from attempting to collect discharged debts from the debtor, the creditors are not enjoined from enforcing *in rem* remedies. Personal liability of a debtor has been discharged under 11 U.S.C. §524(a)(2), but the *in rem* remedies survive the discharge. (78a).

[8] The specific statutory exceptions to discharge are set forth in 11 U.S.C. §523 (Collier 1990). (72a-77a). Post-petition cooperative assessments are not listed within 11 U.S.C. §523. The Fourth Circuit's ruling creates a common law exception to discharge.

language. The equitable principles of the "fresh start" sought by Congress through the Bankruptcy Code hangs in the balance on the outcome of this case.

The impact of the resolution of these issues will be widespread. The impact of this case is not limited to Rosenfeld, but may involve the majority of all debtors and all homeowner's associations throughout the United States. A large number of people reside in homes subject to the controls and assessments of some type of homeowner's association, and the rights of these individuals are at stake in this case.

The growing conflict between the courts in the federal system has caused debtors and homeowner's associations to have inconsistent and conflicting rights based upon the same statutory language. Their rights are entirely dependent upon the *sole factor* of where the debtor declares bankruptcy. If a debtor files for bankruptcy in the Western District of Pennsylvania, Illinois, Ohio, California, Utah, or Minnesota, personal liability for assessments will be discharged. If a debtor resides in New York, Virginia, Colorado, or the Eastern District of Pennsylvania, the debtor cannot obtain a discharge for assessments. If a debtor files in the Middle District of Florida, that debtor cannot even predict what will happen; the Middle District of Florida has conflicting decisions.

Resolving the issue in favor of the debtors will mean that debtors will have the ability to obtain the "fresh start" intended by the Bankruptcy Code. If a debtor is unable to afford to remain in his residence after a bankruptcy (or in the case of an investor, is unable to continue to afford to manage the investment prop-

erty), and if the debtor cannot either sell the property,[9] or transfer the property to the association or secured lender[10], he should have the choice to continue to abandon the property and all appurtenant liability.[11]

A ruling against discharge will greatly hinder the ability of debtors who seek to abandon their property as part of their bankruptcy to obtain a "fresh start." Homeowner's associations will be encouraged to ignore their *in rem* rights and continue to attack a debtor who has already cried "uncle" by seeking refuge in the Bankruptcy Court, and assessments will continue to accrue against the debtor until such time as the lender decides to foreclose upon the property. In Rosenfeld's case, the lender has not foreclosed after almost four years.

Another problem with the Fourth Circuit's decision is that, even if an association or a mortgage noteholder eventually exercises *in rem* remedies, the association could still obtain a judgment against the debtor. The association would thereby enjoy a position far superior

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[9]The lien of the first Deed of Trust noteholder, which was discharged to Rosenfeld personally, exceeds the market value of the Unit.

[10]In Virginia, a borrower cannot convey property to a secured lender or association without their consent. *Skipwith v. Cunningham*, 35 Va. (8 Leigh) 271 (1837). In this case, neither Trustbank nor River Place consented to accept a deed in lieu of foreclosure.

[11]Rosenfeld does not contend that a debtor should be allowed to live in a residence and *not* pay homeowner's association dues. A homeowner's association will still be able to assess the dues against the property. If the debtor does not pay the dues, the association can pursue its *in rem* remedies, including foreclosure, eviction of the debtor, and in the instant case, rental of the Unit by River Place.

to all other creditors, and effectively prevent the "fresh start" so desperately needed and sought by the debtor. Rosenfeld, on behalf of all debtors owning property subject to a homeowner's association, asks this Court to prevent such an inequitable result.

Debtors such as Rosenfeld who were the victims of the economic downturn of the late 1980s and early 1990s should not be penalized because their lender, cooperative association, condominium association, or homeowner's association did not diligently pursue their remedies. The debtor, by filing for relief in the Bankruptcy Court, has taken all the action he can possibly take; and the association must be forced to take some action to mitigate its damages.[12]

If not reviewed by this Court, the Fourth Circuit's decision will prevail, the conflict among the various circuits will continue, and debtors will be deprived of their ability to obtain a "fresh start".

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[12]In the case of Rosenfeld, as with many others, the lender was taken over by the Resolution Trust Company, and his property currently sits in an administrative morass. Almost four years have passed since Rosenfeld filed for Chapter 7 protection, and the first Deed of Trust noteholder still has not foreclosed upon the Unit. Rosenfeld has been denied use and possession of the Unit, and the Unit remains vacant to date. The Association, during this period of time, has not foreclosed on the Unit to enforce their lien, nor has the Unit been rented.

CONCLUSION

For the foregoing reasons, we respectfully request that this Petition for Writ of Certiorari be granted and that the decision of the Court below be reversed.

Respectfully submitted,

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